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Supreme Court, U.S.
FILED
MAY 20 1996
CLERK

No. 95-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRET E. CAHILL,

PETITIONER,

v.

UNITED STATES DEPARTMENT OF LABOR AND ROBERT B. REICH,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY

The government's brief in opposition independently illustrates why the petition for writ of certiorari should be granted. The respondents never answer the question they themselves present. Also, the government raises the issue of free speech in government fora after the appellate court "assumed" Cahill satisfied the "injury in fact" prong of standing, a violation of first amendment rights.

I. RESPONDENTS NEVER DISAGREE WITH PETITIONER ON GOVERNMENTAL INACTION

The respondents present the proper issue in their question, "[w]hether petitioner lacked standing to sue the Secretary of Labor for allegedly violating his First Amendment Rights by failing to require States operating federally subsidized employment offices to give former employees, including petitioner, access to the offices' communication services." (Resp. Brief, p. I). Only two statements in the text,[1] however, can possibly be construed as an answer: "Petioner alleged no injury that 'reasonably

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[1] Respondents argue at the end of a footnote that "Congress has broad discretion to refrain, or to allow federal agencies to refrain, from imposing particular requirements as a condition of state participation in a federally funded program." (Resp. Brief, p. 7, n. 3, ¶ 3). This wholly unsupported assertion conflicts with at least one other judicial circuit: "The APA defines 'agency action' to include 'failure to act.' 5 U.S.C. § 551(13)." *N.A.A.C.P.* v. *Secretary of Housing & Urban Dev.*, 817 F.2d. 149, 160 (1st Cir. 1987). Respondents' purpose is uncertain here. A preceding statement held "petitioner claims (Pet. 15) that the Department of Labor's unexercised capacity to require States to *create* public fora subjects the Department to First Amendment liability, there is no basis for that claim." (original emphasis) (Resp. Brief, p. 7, n. 3, ¶ 3). Nothing in the record suggests petitioner ever claimed that the federal government must require States to create public fora.

can be said to have resulted, in any concretely demonstrable way,' from the Department's conduct. *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975)."[2] (Resp. Brief, p. 6); "No such federal requirement or action caused the harm of which petioner complains." (Resp. Brief, p. 8). Only two conclusions may be drawn depending on whether the terms "Department's conduct" or "federal requirement or action" are assumed to include "failing to require States." Neither assumption leads to an outcome different than that arrived at by the petitioner.

If it is assumed that "failing to require States" *is* equivalent to or *is* included under "Department[al] conduct" or "federal requirement or action," the government has an answer to its question, but it is the same conclusion as that arrived at by the petitioner because respondents never dispute any of the cases that hold that injuries sustained in cooperative programs are traceable to the federal government's actions or requirements. *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980); *Califano* v. *Westcott*, 443 U.S. 76 (1979) (some citations omitted) (Resp. Brief, p. 7 - 8).

If, on the other hand, it is assumed the terms are not equivalent, federal respondents never answer their own question because the government never mentions anything anywhere else that can be taken to mean "failure to act."[3]

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[2] Respondents also cite *Allen* v. *Wright*, 486 U.S. 737, 753, n.19 (1984) (Resp. Brief, p. 6, n.2) but never explain how these cases relate to constitutional injuries sustained in cooperative programs.

[3] Respondents cited some of the order which also addressed issues that were never presented, that petitioner failed to allege the restrictions "stem from the DOL's violation of, or enforcement of, statutory or regulatory standards" or to "identify regulations or agency decisions that effectively prohibit or discourage States from making their federally-subsidized services available to non-employers." (Resp. Brief, p. 5-6)(App. A, p. 7a). The record, however, does not reflect that the issue was enforcement of

II. RESPONDENTS CONTRADICT THEMSELVES AS WELL AS THE APPELLATE COURT CONCERNING PETITIONER'S CONSTITUTIONAL INJURY

The appeals court assumed Cahill suffered an injury. (App. A, p. 7a). The respondents also imply petitioner's injury in their answer: "Petitioner cannot trace his injury . . ." (Resp. Brief, p. 7). The government, however, in a footnote writes: "Petitioner's First Amendment claim is without merit in any event." (Resp. Brief, p. 6, n. 3, ¶ 1). Respondents then claim that the public employment offices are "neither traditional nor limited public fora, but nonpublic fora." *Id.* The respondents never provide any reasoning other than to simply state that the Court "has recognized many comparable facilities as nonpublic fora." *Id.* The government provides some citations but never explains any comparison between the nonpublic fora in the case law and the employment offices.

The government cites two cases where the "status" or "class" of a speaker resulted in a constitutional restriction of freedom of speech in a nonpublic forum. *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). (Resp. Brief, p. 7, n. 3, ¶ 2).

In *Cornelius* (content-based censorship in a nonpublic forum) the government relied on an executive order that

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statutory or regulatory standards or whether the federal government may actively prohibit or discourage States from making their federally-subsidized services available to non-employers. The issue is whether the federal government may, through inaction, allow the States to promote or engage in unconstitutional viewpoint-based censorship with federal funds. As clearly stated in the complaint, "the DOL has . . . '[a]llowed the governors and civil servants of the states to arbitrarily decide who may communicate with federal funds . . .'" (App. A, p. 4a).

specifically ruled out the class of speakers who solicited money for advocacy litigation. In *Perry* (exclusive access of elected speaker to nonpublic forum) a provision in the bargaining agreement provided that access rights to mail facilities were not available to any rival union.

In this action, respondents never cite any authority that implies Cahill or other nonemployers belong to a different "class" or have a different "status" than employers. Further, nothing in 29 U.S.C 49 *et seq.* or 20 C.F.R. 652 *et seq.* suggests Cahill, former employees and other nonemployers be treated on a different basis as employers.

The Wagner-Peyser Act specifically states the offices are for disseminating "information as to opportunities for employment." Even if the offices are considered nonpublic fora, the content of petitioner's speech, employment information, is identical to that for which the offices were established. The only difference is petitioner's viewpoint. The "State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not *an effort to suppress expression merely because public officials oppose the speaker's view.*" (added emphasis) *Perry, supra,* at 46. The federal government has yet to produce any reason for suppressing Cahill's speech.

CONCLUSION

Inaction or failure to act on a constitutional injury is as reviewable as illegal governmental action. The Eleventh Circuit opinion in direct conflict with at least one other judicial circuit. Certiorari should be granted.

Respectfully submitted. BRET E. CAHILL
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MAY 1996